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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 651

B. R. SHEFFIELD, *Petitioner*

v.

ERNEST BROOKS, Sheriff of Hill County, Texas, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

ERNEST BROOKS, Sheriff of Hill County, Texas, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, B. R. Sheffield, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above-entitled case denying petitioner's application for a writ of habeas corpus, and the denial of petitioner's petition for rehearing dated October 6, 1964.

OPINIONS BELOW

The opinion of the court below is not yet reported and is printed herein in Appendix A. The original opinion of the court of August 31, 1964, affirming the order of the District Court for the Western District of Texas which denied a writ of habeas corpus is printed in Appendix A, at pp. 1a-5a, *infra;* the court's opinion of October 6, 1964, denying petitioner's petition for rehearing is printed at p. 7a, *infra.* The District Court issued no opinion, but made findings of fact and con-

clusions of law, which are printed in Appendix A, at pp. 8a-9a, *infra*.

Petitioner was convicted in the District Court of Hill County, Texas, of knowingly uttering a forged instrument. The opinions of the Texas Court of Criminal Appeals affirming the conviction and denying petitioner's first and second motions for rehearing are printed in Appendix A, at pp. 9a-20a, *infra*. Also noted is the opinion of the Court of Criminal Appeals of April 24. 1957, reversing petitioner's conviction under a prior indictment based on the same transactions, reported at 165 Tex. Crim. 354, 307 S. W. 2d 100 (1957). (R. I, 335-42.)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 31, 1964. Petitioner's petition for rehearing was denied on October 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals denied petitioner due process under the Fourteenth Amendment of the United States Constitution by sustaining petitioner's conviction on the basis of a finding that petitioner had committed an offense for which he was never tried below, and which, in fact, had been abandoned by the State in two separate trials.

2. Whether such a finding by the Court of Criminal Appeals violated the Due Process Clause of the Fourteenth Amendment by unfairly exposing petitioner to double jeopardy for an offense for which he had been acquitted twice.

3. Whether the Fifth Circuit Court of Appeals erroneously interpreted the decision of the Texas Court of Criminal Appeals.

4. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a state court in a criminal proceeding can deny a defendant an opportunity to present evidence in support of an application for probation and suspension of a sentence of confinement imposed by a jury.

STATUTES INVOLVED

The statutes involved are Articles 1006-1011, comprising Chapter 2 of Title 14 of the Texas Penal Code, which covers offenses involving forged instruments affecting land documents; Section 3 of the Texas Adult Probation and Parole Law of 1957, Article 781d of the Texas Code of Criminal Procedure; Article I, Section 14 of the Texas Constitution prohibiting double jeopardy; and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The pertinent provisions of the Texas statutes involved herein are set out in Appendix B.

STATEMENT OF THE CASE

This is a habeas corpus proceeding under 28 U.S.C. § 2254(1).[1] The United States District Court for the Western District of Texas found that petitioner had

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[1] The record filed with the Supreme Court is in three parts and is referred to herein as follows:

"R.I—" refers to that portion of the record containing the pertinent motions, opinions and other papers filed in the various proceedings below.

"R.II—" refers to the copies of the briefs filed on appeal in the Court of Appeals for the Fifth Circuit.

"R.III—" refers to the 9-volume transcript of evidence presented at petitioner's trial below.

exhausted his state court remedies and that his application for habeas corpus presented no substantial federal question. The Court denied a certificate of probable cause. (Appendix A, pp. 8a-9a, *infra.*) Petitioner's application for habeas corpus presented the same questions heretofore presented to this Court in *Sheffield* v. *Texas,* 375 U.S. 833 (1963), petition for certiorari to the Court of Criminal Appeals of Texas, denied by the Court on October 14, 1963, Justice Douglas being "of the opinion that certiorari should be granted" (R. I, 357).

Chief Circuit Judge John R. Brown issued a certificate of probable cause and fixed bail pending appeal (R. I, 39). The Court of Appeals for the Fifth Circuit affirmed the District Court's decision. The Court also denied a petition for rehearing, but allowed bail pending the final order of this Court.

In the state trial court, petitioner was indicted on two counts under Chapter 2 of Title 14 of the Texas Penal Code. The first count charged that petitioner, with intent to defraud, committed forgery by aiding, encouraging and procuring the forgery of an acknowledgment of an instrument relating to land by a notary public, Doris Sayles (R. I, 118-25). The second count charged that petitioner, with intent to defraud, knowingly passed this forged acknowledgment to the Texas Veterans' Land Board (R. I, 125-32). Petitioner pleaded not guilty to both counts. As hereinafter noted, the first count was not submitted to the jury; however, petitioner was convicted below under the second count of passing a forged instrument in violation of Article 1008 of the Code. The jury imposed on petitioner a sentence of 6 years in the state penitentiary.

The alleged forged acknowledgment which petitioner was convicted of passing was a part of an application personally signed by a Texas Korean War veteran, A. G. Mireles, to the Texas Veterans' Land Board for about $7,000 to purchase 200 acres of farm land allegedly owned by petitioner and his associates. Pursuant to the procedure provided under the Texas Veterans' Land Law, the Board purchased the land and in turn transferred it to the veteran under a long-term loan.

The acknowledgment in issue stated that the applicant Mireles had personally appeared before the notary public, Doris Sayles, and acknowledged the signing of the application. The State charged that the acknowledgment was a forgery on the following grounds:

(i) It was false because, as the Texas Court of Criminal Appeals found, although Mireles actually signed the application, he did not personally appear before Mrs. Sayles (Appendix A, p. 11a, *infra*). It was similarly found that she had also signed and certified the acknowledgment at a later time but outside of Mireles' presence (*ibid.*).

(ii) The false acknowledgment, the State charged, constituted a forgery by reason of Article 1007 of the Texas Penal Code. This section provides that any person, authorized to take proof of acknowledgment, who "wilfully and falsely" certifies that an acknowledgment relating to title of land was duly made is guilty of forgery. It is important to note that the trial court specifically instructed the jury that to convict petitioner of passing a forged instrument, it was required to find that the notary public, Mrs. Sayles, had committed the forgery of this acknowledgment. See p. 12, *infra*.

At petitioner's trial, the State prosecution sought to show that the applicant Mireles in fact did not wish to purchase the land in question, but had signed the application upon payment of $100 by an alleged accomplice of the petitioner. The State also sought to show that Mireles' application, together with applications of other veterans procured by the same means and covering other parcels of farm land allegedly owned by petitioner and his associates, was submitted by accomplices of petitioner to the Texas Veterans' Land Board and that the Board paid petitioner and his associates inflated prices for the land. Petitioner, a contractor who had no prior criminal record, took the stand and denied the State's charges.

Petitioner bases this petition on the following events occurring during the course of the proceedings below:

First: The Court of Criminal Appeals of Texas, in reviewing petitioner's conviction, upheld the judgment of the trial court on a finding that petitioner, rather than Mrs. Sayles, committed the forgery of the acknowledgment in question. However, this charge had never been submitted to the jury below, and petitioner in fact had been twice acquitted of this offense inasmuch as the charge had been abandoned in two proceedings against petitioner, including the trial below.

Specifically, on the appeal, petitioner contended that there was no forgery of the acknowledgment within the meaning of Article 1007. The record showed that there had been no forgery of the signatures on the application or on the acknowledgment, and that the notary public, Doris Sayles, in making the acknowledgment lacked the requisite intent to defraud as prescribed to establish a forgery under Article 1007; indeed, the

record showed that she had no knowledge of the alleged illegal scheme of petitioner involving the Texas Veterans' Land Board. The Court of Criminal Appeals, in its original opinion, however, rejected this contention on the ground that no intent to defraud was required to establish the commission of forgery under Article 1007.

Petitioner, in his first motion for rehearing, then cited the Texas authorities demonstrating that a fraudulent intent was an essential element of the offense under Article 1007. The Court of Criminal Appeals issued a second opinion overruling petitioner's motion. In answer to petitioner's citation of authorities, the court set forth a wholly new basis to support its conclusion that the acknowledgment had been forged as charged. Specifically, it found that, without regard to Doris Sayles' intent in making the false acknowledgment, the evidence was sufficient to establish that petitioner possessed a fraudulent intent and that he was a principal in the commission of the alleged forgery offense. As the court found (Appendix A, p. 18a, *infra*):

> "It is strenuously re-urged that the evidence is insufficient to support the conviction on the ground that there is no showing that Doris Sayles, the notary, had any fraudulent intent when she certified that Mireles had appeared before her in the making of the acknowledgment.
>
> "In addition to the disposition made of this contention in the original opinion, it is further concluded that without regard to whether Doris Sayles innocently, or while acting as a principal, certified that Mireles appeared before her as a notary, the evidence is sufficient to warrant the finding that the appellant had the intent to de-

> fraud and was a principal in the commission of the offense charged."

At the first opportunity, in his second motion for rehearing, petitioner raised the issue of the serious deprivation of due process under the Fourteenth Amendment committed by the Court of Criminal Appeals in sustaining petitioner's conviction on the basis of a finding that petitioner had perpetrated a forgery. As petitioner noted below, such a finding (a) deprived petitioner of a fair trial and of his right to trial by jury, and (b) also unfairly exposed him to double jeopardy. This was true because petitioner had not been tried below for the forgery offense and had been previously acquitted of the charge under controlling Texas law.

In fact, the trial court had refrained from submitting the first count of the indictment to the jury; this charged petitioner with committing the very offense found by the Court of Criminal Appeals. Moreover, in petitioner's prior trial, the State had expressly elected to abandon a virtually identical count involving the same offense. (See R. I, 318.)[1] Under Texas law, such abandonment of a charge constitutes an acquittal. Consequently, petitioner stood twice acquitted of forgery. Nonetheless, the Court of Criminal Appeals sustained his conviction by holding him guilty of the same charge.

Second: Petitioner was refused an opportunity by the trial court to present evidence on his application

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[1] At this trial, petitioner was convicted of passing a forged instrument. However, this conviction was reversed by the Court of Appeals because of an evidentiary deficiency and other errors not pertinent here . See *Sheffield* v. *Texas*, 165 Tex. Crim. 354, 307 S.W.2d 100 (1957).

for probation. After the jury imposed its sentence of confinement on petitioner, he filed an application with the trial court for probation and suspension of the sentence pursuant to Article 781d of the Texas Code of Criminal Procedure. This provision permits the court to grant such an application when "the ends of justice and the best interests of the public and defendant will be subserved thereby. . . ." In furtherance of this application, petitioner proffered evidence which showed, among other things, that he was in poor health, and that the State would recover in full all of its funds allegedly paid over to petitioner, plus an additional profit of $30,000 by reason of the increased value of the land in issue. (See R. I, 237-41.)

The trial court, however, refused to afford petitioner a hearing. The court ruled that in view of petitioner's conviction, it had no "patience" with the application and rejected it summarily (R. I, 251). It accordingly rejected petitioner's application without considering petitioner's proffered evidence. In fact, in the bill of exceptions filed with the Court of Criminal Appeals, the trial court took note that it "specifically does not certify that any of the proffered facts . . . are in fact true, but that they are [petitioner's] allegations" (R. I, 255).

Petitioner duly excepted to the trial court's ruling. On appeal to the Court of Criminal Appeals, he specifically raised the issue that this refusal contravened petitioner's rights under the Due Process Clause of the Fourteenth Amendment. The Court of Criminal Appeals, however, sustained the trial court's decision on the ground that the grant of probation was discretionary with that court. (See Appendix A, p. 16a, *infra*.)

As noted, these matters were presented to this Court in connection with petitioner's previous petition for certiorari, *Sheffield* v. *Texas, supra;* they were further raised in the proceedings below on petitioner's application for a writ of habeas corpus in the District Court for the Western District of Texas, and following that Court's denial of petitioner's application, in the Court of Appeals for the Fifth Circuit. With respect to petitioner's first contention regarding the disposition by the Texas Court of Criminal Appeals, the Fifth Circuit Court of Appeals rejected petitioner's claim on the ground that the Texas Court of Criminal Appeals had ruled that an intent to defraud was not an element of crime defined under Article 1007, although the Court of Appeals expressly acknowledged that the Texas Court's opinion was "not altogether free of difficulty." The Court of Appeals similarly rejected petitioner's second contention regarding his right to a hearing on probation, on the ground that this was a discretionary matter with the state court.

REASONS FOR GRANTING THE WRIT

1. The Affirmance of Petitioner's Conviction on the Basis of a Charge for Which He Was Never Tried and Twice Acquitted

In *Cole* v. *Arkansas,* 333 U.S. 196, 200 (1948), this Court upheld the contention virtually identical to the point advanced below by petitioner herein, that "to sustain a conviction on grounds . . . which the jury had no opportunity to pass upon deprives the defendants of a fair trial and a trial by jury, and denies the defendants the due process guaranteed by the Fourteenth Amendment to the United States Constitution." As the Court specifically ruled in *Cole* v. *Arkansas* (333 U.S. at 201):

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

This court has repeatedly applied this fundamental principle in condemning efforts by state appellate courts to overcome serious evidentiary deficiencies and other errors in trial court proceedings by upholding convictions on the basis of charges not in fact tried below. *E.g., Cole* v. *Arkansas, supra; Garner* v. *Louisiana,* 368 U.S. 157, 164 (1961); *Thompson* v. *Louisville,* 362 U.S. 199, 206 (1960); *De Jonge* v. *Oregon,* 299 U.S. 353 (1937). As the Court held in *De Jonge* v. *Oregon, supra,* 299 U.S. at 362: "Conviction upon a charge not made would be sheer denial of due process."

In this case, in an effort to uphold petitioner's conviction despite a serious deficiency in an essential element of proof, the Texas Court of Criminal Appeals similarly deviated from the standards of due process established by the cited decisions. Thus, under the indictment, the State was required to prove that the acknowledgment which petitioner allegedly passed to the Texas Veterans' Land Board was actually forged. However, as already noted, it was established that there was no forgery of any signature on the application or on the accompanying acknowledgment. Moreover, the testimony of the notary public, Doris Sayles, who appeared as a State witness, plainly revealed that she had no intent to defraud in making the acknowledgment outside of the applicant's presence. (See R. III, 593-651.)

To sustain the conviction, despite this lack of evidence, the Court of Criminal Appeals was impelled to

find that petitioner was guilty of the charge, never tried below, that he was a principal in the forgery. Under the decisions of this Court cited above, this was clearly a "sheer denial of due process."

There is no doubt that the affirmance by the Court of Criminal Appeals was based on an untried charge. The instructions show that the only forgery issue submitted to the jury was whether Doris Sayles—not petitioner—had forged the instrument. The trial court's instruction on the forgery issue was this:

> "You are instructed that *before you can convict the defendant of knowingly passing a forged instrument in this cause,* you must find and believe beyond a reasonable doubt that the *acknowledgment of Alfonso M. Mireles* to the application and contract of sale submitted to the Veterans' Land Board *was in fact willfully forged by Doris Sayles,* meaning by the term 'willfully' that such action was taken with evil intent or legal malice, or without reasonable grounds to believe the act to be lawful, and you must further find and believe, beyond a reasonable doubt that defendant passed the acknowledgment of Alfonso G. Mireles to the Veterans' Land Board . . . ." (Emphasis supplied.) R. I, 160.

The trial court refrained altogether from submitting to the jury the first count of the indictment which alleged that petitioner was a principal in the commission of the forgery by Doris Sayles, the very charge on which he now stands convicted, not by a jury, but by the Texas Court of Criminal Appeals. Moreover, as also noted, in petitioner's first trial, the State had expressly abandoned the count and elected not to submit it to the jury. (See R. I, 318.) As we next show, petitioner accordingly stood twice acquitted of the

offense of forgery. There was clearly no justifiable ground, under any concept of due process, supporting the Court of Criminal Appeals' decision to sustain petitioner's conviction on this basis. As this Court also held in *Cole* v. *Arkansas, supra* (333 U.S. at 201):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

It follows that petitioner's conviction plainly constitutes a serious and intolerable deviation from established principles of due process of law within the meaning of the Fourteenth Amendment.

2. Petitioner's Unfair Exposure to Double Jeopardy

Petitioner further submits that the affirmance of petitioner's conviction on the basis of the forgery charge violated the double jeopardy prohibitions embodied in the Due Process Clause of the Fourteenth Amendment. It is beyond question that under Texas law petitioner stood *twice acquitted* of the offense of forgery. *Black* v. *State,* 143 Tex. Crim. 318, 158 S.W. 2d 795 (1942); *Parish* v. *State,* 145 Tex. Crim. 117, 165 S.W. 2d 748 (1942); *Betts* v. *State,* 60 Tex. Crim. 631, 133 S.W. 251 (1911). Having been so acquitted, petitioner could not be tried again for the offense of forgery under Texas law. See Texas Constitution, Article I, Section 14.

We submit that this case presents an appropriate and timely opportunity for the Court to consider the proper scope of protection afforded by the Due Process Clause of the Fourteenth Amendment against a state's

contravention of the principles of double jeopardy. In *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937), this Court held that the Fourteenth Amendment did not embody the double jeopardy provisions of the Fifth Amendment. In contrast, however, for purposes of federal criminal proceedings, the Court has stringently enforced the double jeopardy restraints under the Fifth Amendment. See, *e.g., Green* v. *United States,* 355 U.S. 184 (1957); *Downum* v. *United States,* 372 U.S. 734 (1963); cf. *Petite* v. *United States,* 361 U.S. 529 (1960). This has included the absolute prohibition of a subsequent prosecution of a defendant based on any matters encompassed by a prior acquittal of the defendant, even where the subsequent prosecution involves a different offense. See, *e.g., Sealfon* v. *United States,* 332 U.S. 575 (1948); cf. *Yates* v. *United States,* 354 U.S. 298, 336 (1957); *United States* v. *Oppenheimer,* 242 U.S. 85 (1916). The standards of these cases would clearly condemn the ruling of the Court of Criminal Appeals in this case that petitioner was guilty of the offense of forgery.

The rule of the *Palko* case, that the Fourteenth Amendment affords a limited protection against the imposition of double jeopardy by the states, has been upheld in this Court by increasingly narrow majorities. See *Hoag* v. *New Jersey,* 356 U.S. 464 (1958) (5-3 decision); *Ciucci* v. *Illinois,* 356 U.S. 571 (1958) (5-4 decision); cf. *Bartkus* v. *Illinois,* 359 U.S. 129 (1959) (5-4 decision). As Justice Douglas stated in his dissent, concurred in by Justice Black, in *Hoag* v. *New Jersey,* 356 U.S. 464, 477 (1958):

> "We recently stated in Green v. United States, 355 U.S. 184, that by virtue of the constitutional protection against double jeopardy an accused can

be forced to 'run the gantlet' but once on a charge. That case, involving a federal prosecution, provides for me the standard for every state prosecution as well, and by that standard this judgment of conviction should be reversed."

With increasing frequency, this Court has found that in many areas of criminal procedure, the constitutional requirements applicable to federal and state proceedings involve the same considerations of fundamental justice and require the application of the same standards. See, *e.g., Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Mapp* v. *Ohio,* 367 U.S. 643 (1960); cf. *Douglas* v. *California,* 372 U.S. 353, 355-58 (1963). It is no less essential that the court re-evaluate the differences in the constitutional treatment of double jeopardy principles in federal and state proceedings, and adopt more uniform standards. This case presents an appropriate opportunity for such a re-evaluation and should accordingly be reviewed by this Court.

3. The Erroneous Interpretation By the Fifth Circuit Court of Appeals of the Opinions of the Texas Court of Criminal Appeals

In an effort to avoid the serious constitutional questions raised by petitioner on this score, the court below, sidestepped petitioner's contentions by ruling that the Texas Court of Criminal Appeals had ruled that an intent to defraud was not an element to establish a forgery under Article 1007 in its original opinion. Specifically, according to the Fifth Circuit Court of Appeals, this ruling still stands because the Texas Court of Criminal Appeals had not withdrawn it in issuing its second opinion on the petitioner's motion for rehearing, in which, as noted, the Texas Court sought to sustain the conviction on the basis that peti-

tioner had committed the forgery. We submit that the Court of Appeals was in error.

In the first place, as the Court of Appeals admitted, the opinion of the Texas Court of Criminal Appeals is "not altogether free of difficulty." The undisputed fact is that while the Texas Court declined to withdraw its initial opinion on this point, it felt constrained to issue another opinion holding that petitioner was guilty of the untried forgery charge. The inference is accordingly warranted that the Court recognized the infirmity of its original opinion and required a different ground for affirming petitioner's conviction—namely, the determination that he had committed the offense of forgery which had never been tried; otherwise the issuance of an opinion with this determination was superfluous. Petitioner was thus deprived of due process by reason of the appellate court's action in convicting him of a criminal charge which he had no opportunity to contest.

Moreover, the Texas Court's second opinion was rendered in response to petitioner's Motion for Rehearing, containing citations of Texas authorities which overwhelmingly establish that a fraudulent intent is necessary to establish a forgery under Texas law, and to make a forged acknowledgment in violation of Article 1007 of the Texas Penal Code.[1] There is no question that a fraudulent intent has long been established as an essential element of the crime of

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[1] For example, Article 1010, in dealing with the requirements of proof under Chapter 2 of Title 14 of the Texas Penal Code, which includes Article 1007, refers repeatedly to the necessity for establishing a "fraudulent intention" and an "intent to defraud" under all of the articles in Chapter 2, without qualification. See Appendix B, p. 22a, *infra*.

forgery and that this has been uniformly recognized by the courts of many other jurisdictions as well as Texas. See, *e.g.*, *Owen* v. *People*, 118 Colo. 415, 195 P. 2d 953 (1948) (en banc); *Smith* v. *Commonwealth*, 282 S.W. 2d 618 (Ky. 1955); *Commonwealth* v. *Analetto*, 326 Mass. 115, 93 N.E. 2d 390 (1950); *Hays* v. *State*, 43 So. 2d 206 (Miss. 1949) (en banc); *Brown* v. *Bailey*, 215 S.C. 175, 54 S.E. 2d 769 (1949). Indeed, if the Texas Court of Criminal Appeals had issued a final ruling that a fraudulent intent was not necessary to establish a forgery, it would constitute a wide departure from accepted principles and would itself raise serious Due Process questions. Cf. *Morissette* v. *United States*, 342 U.S. 246 (1952). Clearly, in the face of these circumstances, the Court of Appeals committed error in presuming that the Texas Court of Criminal Appeals intended to establish a new and novel rule for proving forgery.

In any event, while petitioner believes it is clear that the Texas Court of Criminal Appeals plainly sustained his conviction on charges not tried below and for which he stood acquitted, petitioner should not be denied protection of the Federal Constitution on the basis of an opinion which is conceded to be "not altogether free of difficulty."

This Court has emphasized that it is important "that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940). The Court continued:

> "Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.

> Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions."

Ibid. These principles have been frequently reaffirmed. See, *e.g., State Tax Comm'n* v. *Murray Co.,* 364 U.S. 289 (1960) (per curiam); *Kovacs* v. *Brewer,* 356 U.S. 604 (1958); *Blackburn* v. *Alabama,* 354 U.S. 393 (1957) (per curiam); *San Diego Building Trades Council* v. *Garmon,* 353 U.S. 26 (1957).

No criminal conviction should be sustained if the basis for it is unclear. At the very least, this Court should remand the case for clarification by the Texas Court of Criminal Appeals.

4. Petitioner's Right to Hearing on Application for Probation

The final question relates to the refusal of the trial court to grant petitioner an opportunity to present evidence in support of his application for probation and suspension of the sentence imposed under Texas procedure by the jury.

So far as we know, this Court has never decided the issue whether the Due Process Clause of the Four-

teenth Amendment entitles a defendant to such a hearing. We submit, however, that the refusal of the State to recognize this right is not in accordance with the basic concepts of fair procedure recognized by this Court as guaranteed under the Fourteenth Amendment, and that review is accordingly warranted. See Rule 19(a), Supreme Court Rules. The Court has frequently noted that "the scope of due process [under the Fourteenth Amendment] . . . comprehends . . . the right to be heard." See, *e.g.*, *Fay* v. *Noia*, 372 U.S. 391, 427 (1963). As the Court noted in *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932):

> "an opportunity of being heard is . . . among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

And this "right to be heard" plainly applies to the sentencing stage of a criminal proceeding, which involves a critical issue of a defendant's liberty or confinement. Cf. *Townsend* v. *Burke*, 304 U.S. 736 (1948).

The Texas Probation Law has been interpreted to be in all essential respects the same as the Federal Probation Statute, 18 U.S.C. § 3651. See *State* v. *Klein*, 154 Tex. Crim. 31, 224 S.W. 2d 250 (1949). Under federal procedure, the defendant is specifically provided under Rule 32(a) of the Federal Rules of Criminal Procedure, with "an opportunity to make a statement on his own behalf *and to present any information in mitigation of punishment.*" (Emphasis supplied.) The Court has regarded the opportunity afforded under Rule 32(a) to be of such importance that it has reversed a conviction and required resentencing where the defendant has been denied an opportunity to make a statement before sentencing. See *United States* v.

Behrens, 375 U.S. 162 (1963); *Van Hook* v. *United States,* 365 U.S. 609 (1961); cf. *Green* v. *United States,* 365 U.S. 301 (1961). The federal practice is, we submit, a reflection of rudimentary safeguards which should be held applicable under the Fourteenth Amendment to state proceedings, safeguards which plainly require that petitioner be permitted an opportunity to present evidence on behalf of an application for probation.

The Court has held that the state courts are afforded a wide discretion in the sources and types of information which they may rely upon in sentencing an accused. See *Williams* v. *New York,* 337 U.S. 241 (1949); *Williams* v. *Oklahoma,* 358 U.S. 576 (1959). However, these decisions were expressly grounded on the availability to the accused of an opportunity to present evidence in mitigation. Thus, in *Williams* v. *Oklahoma, supra,* in upholding the defendant's sentence on the basis of information outside the record of the proceedings, the Court specifically noted (358 U.S. at 583):

> "It is not contended that petitioner requested or suggested that the trial court hear evidence in mitigation of the sentence .... In these circumstances, we cannot say that petitioner was deprived of any right or of fundamental fairness by the fact that the trial court did not pursue the presentencing procedures prescribed by the Oklahoma statutes."

See also *Williams* v. *New York, supra,* 337 U.S. at 244.

In contrast, here an opportunity to present evidence in mitigation to the court was denied petitioner. It is fundamental to criminal justice that an accused be permitted to present evidence and to have an opportunity to persuade the court to accept his position,

regardless of the court's inclination to regard his cause as unmeritorious. Cf. *Douglas* v. *California,* 372 U.S. 353 (1963); *Chessman* v. *Teets,* 354 U.S. 156 (1957).

The case accordingly warrants review by this Court on an important issue of procedure under the Due Process Clause. It presents an appropriate and timely opportunity for the Court to consider the guarantees afforded to defendants under the Fourteenth Amendment in the sentencing stage of a state criminal proceeding.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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October 30, 1964